

only and who do not earn retail revenues from end users will not be required to make universal service contributions.

As previously noted, Section 254(d) authorizes the FCC to require “other providers” to make universal service support contributions if doing so would be in the public interest. In the R & O, the Commission bases its public interest rationale for including payphone aggregators as “other providers” on notions of competitive neutrality. Specifically, the Commission expresses concern that if it does not “exercise [its] permissive authority, aggregators that provide only payphone service would not be required to contribute, while their telecommunications carrier competitors would.”³⁸ In addition, the Commission points to its interest in securing contributions from those who, “without benefit of access to the [Public Switched Telephone Network (“PSTN”)] . . . would be unable to sell their services to others for a fee.”³⁹

The Commission’s use of the broad term “aggregator” extends beyond these public interest rationales. First, its “competitive neutrality” concerns suggest that the Commission did not intend to target aggregators who are solely premises owners. Premises owners lease space to others. They do not, as described above, provide any type of transmission service, including pay telephone service. Second, aggregators do not rely (directly, at least) on access to the PSTN to “sell their services” for a fee. Nor -- and perhaps most

³⁸ R & O at ¶ 797.

³⁹ *Id.* at ¶ 796.

importantly -- do they receive the type of revenue upon which contributions are based, *i.e.*, "revenue derived from end users for telecommunications services," also known as "retail revenues."⁴⁰ For these reasons, the Commission should clarify on reconsideration that aggregators who are premises owners only do not -- and cannot, from a logical standpoint -- bear a universal service contribution burden.⁴¹

C. The Monetary Threshold For Determining Which Aggregators Should Be Required To Contribute To The Universal Service Fund Is Arbitrary And Capricious, And Based On Internally Inconsistent Reasoning.

Assuming, *arguendo*, that aggregators are subject to the universal service contribution requirement, the Commission's threshold requirement for determining when the contribution obligation is triggered is arbitrary and capricious and at odds with the reasoning and analysis articulated in the R & O.

The Commission has stated that universal service obligations should apply *only* where the provision of payphones is material to an entity's operations and *not* where it is "merely incidental to [its] primary non-telecommunications business", *i.e.*, not where it is only a "minimal percentage of [a business's] total annual business revenues."⁴² The Commission's threshold test for measuring the "incidental" nature of payphone service, however, is based on the *de minimis*

⁴⁰ *Id.* at ¶ 844. Such end user revenues also include revenues from subscriber line charges and from carriers who use telecommunications services for their own internal uses.

⁴¹ This same clarification should also apply to entities that are solely pay telephone owners, since they do not provide transmission service or receive retail revenues from end users for the provision of telecommunications services.

⁴² R & O at ¶ 798.

exemption, that is, whether the entity's contribution would exceed \$100 per year.

This threshold is arbitrary and capricious for purposes of determining whether payphone revenue is incidental to a business since the test bears no relationship to, and is not designed to measure, whether a company's payphone revenues are large or small compared to the revenues earned from its core business.⁴³

In addition, adoption of the threshold test is internally inconsistent with the Commission's stated rationale for extending the universal service obligation to aggregators. The Commission has asserted that it does "not wish . . . to require contributions from payphone aggregators, such as beauty shop or grocery store owners, retail establishment franchisees, restaurant owners, or schools that provide payphones *primarily as a convenience* to the customers of their primary business and do not provide payphone services as part of their *core business*."⁴⁴

Yet, under the Commission's threshold test, many businesses that provide payphone service solely as a convenience to their customers and for whom payphone service is not a "core business," e.g., hotel or restaurant chains, will be required to contribute to universal service simply because of the sheer number of payphones they make available to the

⁴³ For a further discussion of the *de minimis* exemption, see *supra*, section II.A.

⁴⁴ R & O at ¶ 798 (emphasis added).

public without any regard to whether their payphone revenues are in fact a "minimal percentage" of their total annual business revenues.⁴⁵

In short, the Commission's threshold test is divorced from its stated purpose. It will require contributions from the very types of businesses the Commission has made clear it does *not* intend to reach -- those who are simply providing payphones as a courtesy and whose payphone revenues are a minuscule proportion of their gross revenues. The Commission, therefore, should reconsider (and recant) its application of Section 254(d) to aggregators; but, if the Commission decides that Section 254(d) does apply to aggregators, it should reconsider the threshold test for determining when payphone service constitutes a "core business" activity, defining the test in terms of a percentage of total revenues rather than as an absolute number. If the present record lacks sufficient information to enable the Commission to determine what the appropriate calculus should be, the Commission should re-open the record and solicit additional comments on this issue.

CONCLUSION

For the foregoing reasons, the Commission should reconsider and clarify the indicated portions of the *Universal Service* Report and Order and issue an order clarifying that carriers will not be excused from their contractual obligations

⁴⁵ For example, under the Commission's current scenario, if universal service contributions were set at 1% of an entity's retail telecommunications revenues, then a business that earned at least \$10,000 annually from its payphones would be required to make universal service contributions. While the \$100 contribution threshold would (and should) excuse businesses with low-volume payphones, it would subject businesses with high-volume payphones and multi-location businesses (e.g., with twenty stores having one telephone each) to universal service fund

to customers by virtue of this proceeding; that systems integrators will not be required to contribute to universal service support mechanisms; and that payphone aggregators and payphone service providers will not be required to contribute to universal service support to the extent that they do not provide telecommunications transmission service.

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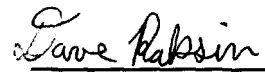
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obligations even if these businesses' telecommunications revenues represented only a small fraction of their overall company revenues.

Certificate of Service

I, Dave Raksin certify that a true and correct copy of the preceding Petition of the Ad Hoc Telecommunications Users Committee For Partial Reconsideration of Report and Order of CC Docket No. 96-45 was served this 17th day of July, 1997 via hand delivery on the following:

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